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EXAMINER

KYLE, CHARLES R

ART UNIT	PAPER NUMBER
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3624

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Please find below and/or attached an Office communication concerning this application or proceeding.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/866,652
Filing Date: May 30, 2001
Appellant(s): INNOCENTI, TOMMASO

Peter Gibson
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed January 18, 2005.

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(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Claimed Subject Matter*

The summary of claimed subject matter (invention) contained in the brief is correct.

(6) *Grounds of Rejection to be Reviewed on Appeal*

The appellant's statement of the grounds of rejection to be reviewed on appeal (issues) in the brief is correct.

(7) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) *Prior Art of Record*

2002/0120555	LERNER	8-2002
2002/0004787	MOSHAL et al.	1-2002
6,332,135	CONKLIN et al.	12-2001

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2002/0032626

Thomas et al.

10-2001

Microsoft Press Computer Dictionary, 3rd Ed., 1997, p.506.

Dennis L. Prince Auction This! Your Complete Guide to the World of Online Auctions, 1999,

Prima Tech Publishing, pages 21-23, 63-65, 69, 71-72, 79-81, 85, 9199, 1 12-113, 124-125, 166-

167, 207-208, 213 .

(9) *Response to Argument*

For the convenience of the Board, the Examiner includes a copy of the Final Office Action dated April 29, 2004. Response to Appellant's argument in the Appeal Brief follows directly.

Office Action of April 29, 2004

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 40-75 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 40 and its dependent Claims recite the phrases "providing the option of provision of a model..." and "providing the option of provision of a sample..." These phrases do not make clear if a model or sample are ever provided and are read as not being limitations.

Additionally, the optional provision does not relate to the rest of the claim language. No use of the quality indications is made in the execution of the auction. An inventive feature such as bid

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calculation based on indicated quality would perhaps relate these limitations to the rest of the Claim.

Claims 53, 54, 57, 59, 60 and 63 recite the qualifier “may choose”, which is unclear as to whether a choice is made.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 40-41, 43, 46-49, 52-54, 56-57, 59-60 and 62-63 are rejected under 35 U.S.C.

103(a) as being unpatentable over *Lerner* in view of *Moshal et al.*

Concerning Claim 40, *Lerner* discloses the invention substantially as claimed including in a business method intended to facilitate flexible terms commodities trading in an exchange (Para. 100 and Title), the steps of:

providing, upon a web site accessible upon the world wide web (Fig. 4D), information of a particular commodity (Fig. 4D, category of sugar) weight (Fig 4D. “14000mt”), price (SBH1 + 12 points), and specific commodity category dependent quality characteristics (Fig. 4D, “bulk world raws”) desired by a prospective buyer (trader; See also para. 99) in completion of a submission for initiating an open bid;

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providing the option of provision of a model of a particular commodity desired for purposes of indicating the quality desired by a prospective buyer (Abstract; para. 62);

providing, upon a web site accessible upon the world wide web (Fig. 4D), information of a particular commodity (Fig. 4D, category of sugar) weight (Fig 4D. "14,000mt"), price (SBH1 + 12 points), and specific commodity category dependent quality characteristics (Fig. 4D, "bulk world raws") offered by a prospective seller (trader; see also para.99) in completion of a submission for initiating an open offer;

providing the option of provision of a sample of a particular commodity desired for purposes of indicating the quality desired by a prospective seller (Abstract; para. 62);

posting upon said web site a listing for a specified lot of a particular commodity in accordance with a completed proposal submission detailing a plurality of terms including weight, price, quality characteristics, delivery and payment comprising an open offer of said specified lot when initiated by a prospective seller and comprising an open bid of said specified lot when initiated by a prospective buyer (Fig. 4E, element 454);

scheduling an auction of said specified lot by posting a plurality of schedule dates including but not restricted to commencement and conclusion dates between which responses to said listing will be received (paragraphs 117, 121);

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posting upon said web site, in association with said listing, counter bids received in response to an open offer and counter offers received in response to an open bid which vary in any of the terms included in said plurality of terms detailed in said listing (paras. 102-107; Fig. 4H);

posting upon said web site, in association with said listing, any offer indications by said prospective seller in response to posted counterbids and any bid indications by said prospective buyer in response to posted counter offers signifying a modification of at least one term in said listing (paras. 102-107);

indicating upon said web site, in association with said listing, the matching in all said terms between any offer and any bid both concerned with said specified lot (para. 108).

Lerner does not specifically disclose the limitation of auction format specification. *Moshal* discloses auction format specification for use by traders (bidders and sellers) in a trading exchange at Fig. 12; paras. 232-234, and paras. 92-99, at least. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the exchange of *Lerner* with the auction format specification disclosed by *Moshal* because this would have obtained the benefits to an exchange specifically set out by *Moshal* at paras. 38-39 and quoted below (particulars benefits are bolded):

An embodiment of the invention includes a system to power exchanges and marketplaces over networks such as the Internet, by providing software and support that allow dynamic pricing of goods and services. In contrast to previous systems that provide static pricing techniques, embodiments of the invention provide dynamic pricing to allow real-time adjustment of prices for purpose of capturing excess value, conducting price discovery, and creating exciting on-line marketplaces. Advantages provided include continuous trading, high transaction volume capacity, customizable information and transaction feedback. Furthermore, the system is data driven and highly configurable, enabling flexibility with high capacity.

There are many types of exchanges--forward, reverse, many-to-one and many-to-many. Examples of existing Internet exchanges include on-line auctions. These existing exchanges generally comprise inflexible and hard-coded software routines to emulate a certain auction type, such as the forward or reverse auction. In contrast, embodiments of the invention employ common characteristics between auction types. The common characteristics of

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these exchanges have been abstracted into a small subset of shared, common parameters. A system provided under an embodiment of the invention implements efficient trading software that generates exchanges and auctions based on the common parameters. By varying these parameters, multiple existing and new types of auction, exchanges and other price interactions may be created and conducted for multiple traders using a network such as the Internet.

With respect to Claim 41, *Moshal* discloses depositing at para. 206.

With respect to Claim 43, *Lerner* discloses a single website as “BigDogTrader.com” at Fig. 4J at least.

With respect to Claim 46, *Lerner* discloses registration access means at para. 94.

With respect to Claim 47, *Lerner* discloses fees at para. 32.

Concerning Claims 48 and 49, see the discussion of claims 46 and 47.

With respect to Claim 52, see *Lerner* at para. 32.

As to Claims 53, 54, 57, 59, 60 and 63, *Moshal* discloses the parameters and combinations recited in the Claims at paras. 146-180.

With respect to Claims 56 and 62, *Moshal* discloses price increase as a function of responses received at para. 97.

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Claims 42 re rejected under 35 U.S.C. 103(a) as being unpatentable over *Lerner* in view of *Moshal et al* and further in view of *Microsoft Press Computer Dictionary*, hereinafter, *Dictionary*.

Concerning Claim 42, *Lerner* and *Moshal* disclose the invention substantially as claimed. See above. They do not specifically disclose that the buyer and seller websites are different. *Dictionary* discloses that individual websites on a common server are possible. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have provided different websites for buyers and sellers to specify auction types because this would have improved accessibility of the auction specification functionality.

Claims 44- 45, 50-51, 55, 58, 61 and 64 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Lerner* in view of *Moshal et al* and further in view of *Auction This*, already of record.

Concerning Claims 44 and 45, *Lerner* and *Moshal* disclose the invention substantially as claimed. See above. They do not specifically disclose that subscribers are notified of listings of interest by e-mail. *Auction This* discloses this feature at page 72, fifth paragraph and page 167, fourth paragraph. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the disclosures of *Lerner* and *Moshal* with the notification of *Auction This*, because this would bring to the attention of traders offers of interest and helped increase market activity and utility.

With respect to Claim 50, *Auction This* discloses a directory of categories at page 71, para. 4. Such a directory structure would have enhanced ease of search and utility of the method.

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As to Claim 51, *Auction This* discloses listing subscriptions at page 166.

With respect to Claims 55, 58, 61 and 64, at page 85 *Auction This* discloses incremental bidding. It would have been obvious to one of ordinary skill in the art at the time of the invention to have incrementally changed prices with respect to time because this would have “moved the auction along” as well as creating a feeling of urgency to participants which would increase auction profitability.

Claim 71 is rejected under 35 U.S.C. 103(a) as being unpatentable over *Lerner* in view of *Moshal et al* and further in view of *Conklin et al*.

As to Claim 71, *Lerner* and *Moshal* disclose the invention substantially as claimed. See above. They do not disclose direct provision of a sample by a seller to a prospective buyer. *Conklin* discloses this feature at Col. 8, lines 17-24. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have used seller provided samples as disclosed by *Conklin* in combination with *Lerner* and *Moshal* because this would have allowed buyers to evaluate potential sellers as set forth by *Conklin* at the same site.

Claims 65 –70 and 72-76 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Lerner* in view of *Moshal et al* and further in view of *Thomas et al*.

As to Claims 65-70, they are the buyer side of sample provision. See the discussion of Claims 71 and 72-76 below. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have for a buyer to provide a sample/model specifying the

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quality of commodities because this would have allowed the seller to know exactly the qualities desired.

As to Claim 72, *Lerner* suggests that the system receives a sample from a seller at para. 62 whereby the system provides access to laboratory testing.

Concerning Claim 73, *Lerner* and *Moshal* disclose the invention substantially as claimed. See above. They do not specifically disclose that laboratory test results are posted to a website. *Thomas* discloses this feature at para. 45. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have posted laboratory results on a website because this would have allowed the buyer to identify a lot which most closely conformed to requirements, as set forth at the same cite.

With respect to Claim 74, it would have been obvious for the auction house to have been a conduit for the seller to buyer sample transfer because this would have allowed the contracting parties to maintain anonymity.

Regarding Claim 75, it would have been obvious to provide proportional divisions of a sample to prospective buyers for assessment because this would have assured comparable sub-samples and would have allowed bidders to adjust their bids based on equivalent quality of sub-samples. This is “comparing apples to apples” – literally.

Concerning Claim 76, see the discussion of claim 75.

Response to Arguments

Applicant's arguments filed February 6, 2004 have been fully considered but they are not persuasive.

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Applicant is referred to MPEP 601.03 for information regarding correspondence address changes.

At pages 1-8 of the Response, Applicant exhaustively discusses elements of the prior office action.

Applicant's substantive argument occur at page 8 and also at pages 14-15, regarding rejections under 35 U.S.C. 112. Applicant fails clearly explain a relationship between the claim language and the passages cited from the prior office action. Applicant fails to address the Examiner's observation that "*No use of the quality indications is made in the execution of the auction. An inventive feature such as bid calculation based on indicated quality would perhaps relate these limitations to the rest of the Claim.*" Applicant fails to discuss his citation of the Examiner's phrasing to explain why his phrasing is clear.

At pages 14 and 15, Applicant argues the first 112 cause for rejection, Applicant's phrasing of "providing an option of provision..." in the Claims rejected under 35 U.S.C. 112, 2nd para. can also be interpreted as merely providing an interface button (option) usable to order a sample or model. Applicant's phrasing is vague as to what is actually provided. Reasonable consideration can be given to meanings in the specification, but the wording is so vague as to be ambiguous.

As to Applicant's argument regarding the rejection over "may choose" phrasing, in each recitation of Claim language at pages 16-17, the wording is vague. In each instance, a seller or buyer has an option of choosing certain parameters, but is not required to do so by the Claim limitations. If the buyer or seller exercises the option to not choose any parameters, the Claim language is irrelevant and not further limiting.

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As to the 35 U.S.C.103 rejections, at section B, para. 2, appears to argue that *Lerner*, by not disclosing auction format specification, is precluded from disclosing an auction. The Examiner cited *Lerner* at paras. 117 and 121 as disclosing an auction which inherently has steps a. and b. at lines 14-17 of page 9 of the response.

At para. 3, Applicant fails to explain why the features disclosed by *Moshal* and providing motivation to combine are not beneficial. *Applicant* quotes *Moshal* as disclosing configurability, flexibility and high capacity. Applicant fails to explain why these are not beneficial and why they would not provide a reason for the combination of references.

At para. 4, Applicant appears to suggest that different buyer and seller web sites provide some feature or advantage; such a feature or advantage is unclaimed and unexplained. More web sites inherently improve accessibility. In response to applicant's argument that there is no suggestion in the prior art to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves ***or in the knowledge generally available to one of ordinary skill in the art.*** See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, different sites increase the number of access points to the system and enhance accessibility.

Applicant's arguments are fully addressed considering all grounds of rejection.

At para. 6, Applicant admits that provision of a sample is "common commerce practice" but fails to address why the Examiner's argument that such samples would help buyers evaluate potential sellers is incorrect.

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As to Applicants argument at para. 7, that there is no suggestion in the prior art to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves ***or in the knowledge generally available to one of ordinary skill in the art***. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

As to Applicants argument at para. 8, that there is no suggestion in the prior art to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves ***or in the knowledge generally available to one of ordinary skill in the art***. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

As to Applicants argument at para. 9, that there is no suggestion in the prior art to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves ***or in the knowledge generally available to one of ordinary skill in the art***. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

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As to Applicants argument at para. 10, that there is no suggestion in the prior art to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves *or in the knowledge generally available to one of ordinary skill in the art*. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

At section D, paras. 7 and 9 and page 18, Applicant appears to try to disqualify the *Lerner* reference through his Declaration dated January 20, 2004. The evidence provided is insufficient to do so. Exhibit A is undated and unsigned and consists only of assertions. No evidenced is provided to show due diligence; such evidence might be provided, for example, as dated research notebooks, dated computer printouts or other detailed records showing daily progress to reduction to practice. As to other paras. In Section D, they are restatements of points addressed above.

Arguments presented by Applicant at other locations of the response are repetitive and addressed above.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO**

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MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Charles R Kyle whose telephone number is (703) 305-4458. The examiner can normally be reached on M-F 6:00-2:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Vincent A. Millin can be reached on (703) 308-1065. The fax phone numbers for the organization where this application or proceeding is assigned is (703) 305-7687

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1113.

crk
April 29, 2004

Response to Appellant's Argument in the Appeal Brief

As a preliminary comment, the Examiner notes that Appellant's Appeal Brief contains extensive argument that is frequently difficult to comprehend because of its complexity and

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verboseness. For example, Appellant addresses a rejection under 35 U.S.C. 112 2nd at pages 4-5. The argument consists of one sentence that is approximately 322 words long. At page 13, line 13 to page 18, line 1, Appellant appears to argue against combination of prior art in the rejection of Claims 40-64; the argument consists of one sentence spanning the six pages. The Examiner responds to Appellant's arguments to his best ability given the state of Appellant's argument.

At pages 4-5, Appellant argues against the 35 U.S.C. rejections by stating that the requirement for clarification is unreasonable. See the relevant Claim language and rejections reproduced above. Appellant seems to combine argument against the two bases of rejection (first - Claim 40 and its dependent Claims; second - Claims 53, 54, 57, 59, 60 and 63) into one extensive argument. With respect to the phrasing of Claims 40 and its dependent Claims a restatement of the Examiners comments in the prior Office Action is presented:

... Applicant's phrasing of "providing an option of provision..." in the Claims rejected under 35 U.S.C. 112, 2nd para. can also be interpreted as merely providing an interface button (option) usable to order a sample or model. Applicant's phrasing is vague as to what is actually provided. Reasonable consideration can be given to meanings in the specification, but the wording is so vague as to be ambiguous.

The Examiner reviewed this rejection with a Business Practice Specialist of Technology Center 3600 during the prosecution of the Application; the Specialist concurred with the rejection. The phrasing is very vague, making the metes and bounds of the Claim unclear.

As to the rejection of Claims 53, 54, 57, 59, 60 and 63, Appellant offers no clear argument against the rejection. In the case of Claim 53, a particular type of bidding is recited, but the phrasing does not make clear whether this bidding is chosen or not. It is clear from the structure of similar Claims 54, 57, 59, 60 and 63 that each of these dependent Claims is intended

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to describe types of bidding having different constraints; Appellant's phrasing makes it unclear whether the differing types of bidding are actually required and limiting.

At page 6, Appellant cites case law and asserts that the Claims are clear and distinctly claim the invention, but provides no logical, clear explanation of why this is so.

At pages 6-8, Appellant seems to argue against the Examiners Response to Arguments of the prior Office Action. Appellant is correct, at page 7, that the Examiner relies on the same logic of prior Office Actions. Appellant has provided no substantive refutation of the rejection so the same logic is applicable.

At page 8, Appellant refers to a possible Examiner's amendment to replace the word "desired" with "offered." Appellant refers to this as a language "informality." In reality, such a substitution would completely alter the meaning of the Claim.

Page 9 presents argument that the *Lerner* should be disqualified as predated by Appellant's possession of an invention. This is evidenced by Appellant's Exhibit A of February 6, 2004 in which Appellant requested information on patenting an invention. The Exhibit shows neither possession of the claimed invention prior to the effective date of *Lerner* nor does it provide any showing of due diligence between conception and constructive reduction to practice. All that is shown is communication related to possibly patenting a raw material auction of some unspecified type. The Exhibit contains no reference to Claim limitations such as web site postings, sample/model provision or auction scheduling and so cannot provide evidence that Appellant's invention predates *Lerner*.

At pages 10-11, Appellant argues use of hindsight by the Examiner. In response to Appellant's argument that the examiner's conclusion of obviousness is based upon improper

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hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Specifically, the Examiner has cited references disclosing limitations of the Claims and provided a reason for combination. See particularly the rejection of Claim 40 above. The Examiner has cited two paragraphs from *Moshal* that disclose benefits of an exchange which are applicable to the exchange disclosed by *Lerner*. Applicant implies hindsight; one of ordinary skill in the trading arts would look to both *Lerner* and *Moshal* as trading exchange art and find them compatible.

At page 12, Appellant argues features from *Conklin* cited in the rejection of Claim 71. Appellant attempts to relate this to the rejection of Claim 40, which did not rely on *Conklin*. The attempt is confusing.

At pages 12-13, Appellant states that his rebuttal was addressed in one paragraph in the Final Office Action. This is because the Examiner is succinct. The remainder of Appellant's comment in point 4 is unclear.

At page 13, Appellant restates elements of the Examiners response to Arguments of the prior Office Action as the beginning of a six page long sentence ending at page 18. Appellant appears to raise no clear, substantive issues in this passage.

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At page 18, point 6, Appellant again discusses comments from the final Office Action. Appellant refers to limitations absent or unsuggested by the prior art but does not identify any such limitations.

At pages 18-19, Appellant cites limitations supposedly absent or unsuggested by the prior art. Appellant should note that the recited website elements and related auction elements were drawn from *Lerner* and the auction format specification came from *Moshal*. The rejection was made over the combination of the references, not just *Lerner*. The Examiner did not rely on an inherent characteristic of *Lerner*, but rather relied on *Moshal* for auction format specification. This is clear from the rejection of the Final Office Action reproduced above.

At page 20, Appellant lists several limitations allegedly absent from the prior art. However, Appellant does not explain why the Examiner's citation to the prior art of each limitation from one or the other of the references is incorrect. All imitations have been cited from either *Lerner* or *Moshal* as set forth in the rejection above. Appellant implies that each claim phrase must be cited from a single reference. The rejections were made over *Lerner* and *Moshal* in combination.

As to Appellant's comments at page 21 regarding provision of a model indicating quality desired by a prospective buyer, Appellant seems to allude to comments in the Office Action of April 15, 2003 where the Examiner commented:

Further, consider that similar considerations would apply for the buyer supplied commodity model in a two-way auction. In this case the buyer would have provided a model as a demonstrator of quality sought rather than provided as with a seller. Provision of such models is old and well-known. An example of such a model is the arsenal model supplied by the War Department to specify the form and quality of military goods to be supplied to the government. Such models were in use in the nineteenth century.

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The Examiner cited *Lerner* with respect to such sample provision in the Final Office Action. Appellant does not respond to this citation. The laboratory testing of sample/models disclosed by *Lerner* would be equally useful to buyer and seller so that the respective parties would have a scientific basis for understanding the quality needs or abilities of the counterparty.

At page 22, Appellant comments on sample/models but fails to provide a clear distinction between a sample and model. Both provide guidance as to the qualities of an item of commerce.

At pages 23-24, Appellant comments on timely filing in triplicate of the Brief, asserts grounds of rejection overcome and lists elements supposedly distinguishing over the prior art. These elements have been cited by the Examiner as present in the prior art cited; Appellant has given no convincing argument as to why the Examiner's citation is deficient.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



Examiner Charles Kyle

crk

March 31, 2005

Conferees

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Peter Gibson

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